RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 26 2015
OFFICE OF THE CLERK

No. 15-118

IN THE

Supreme Court of the United States

JESUS C. HERNANDEZ, *et al.*,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE GOVERNMENT OF THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Donald Francis Donovan
Counsel of Record
Carl J. Micarelli
Brandon P. Burkart
Christel Y. Tham
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
dfdonovan@debevoise.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE INCIDENT IN THIS CASE IS NOT AN ISOLATED OCCURRENCE. 4

II. IT IS IMPORTANT THAT THE U.S. PROVIDE AN EFFECTIVE REMEDY IN CROSS-BORDER SHOOTING CASES 7

A. There Is No Practical Reason to Deny a Remedy Merely Because the Fatal Shot Struck Sergio Hernández on the Mexican Side of the Border 7

B. The U.S. Has Undertaken an Obligation to Provide a Remedy for Human Rights Violations to Individuals on Both Sides of the Border 11

CONCLUSION 18

TABLE OF AUTHORITIES

United States Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 12

Boumediene v. Bush, 553 U.S. 723 (2008) 3, 7, 8, 9, 18

Cazares Santillan v. United States, No. 1:14-cv-00114 (S.D. Tex. May 20, 2015) 6

Hernandez v. United States, 785 F.3d 117 (5th Cir. 2015) 10

Lam Gallegos v. United States, No. 5:14-cv-00136 (S.D. Tex. Aug. 18, 2015) 6

Lawrence v. Texas, 539 U.S. 558 (2003) 12

Perez v. Brownell, 356 U.S. 44 (1958) 8

Rodriguez v. Swartz, No. No. 4:14-CV-02251 (D. Ariz. July 9, 2015), *appeal docketed*, No. 15-16410 (9th Cir. July 15, 2015) 5

Roper v. Simmons, 543 U.S. 551 (2005) 12

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 11

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 3, 8, 9

International Cases

Aisalla Molina Case (Ecuador v. Colombia), Inter-State Petition IP-02, Inter-Am. Comm'n. H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10 (Oct. 21, 2010) 15

Al-Saadoon v. United Kingdom, Eur. Ct. H.R., App. No. 61498/08 (June 30, 2009) 16

Al-Skeini v. United Kingdom, Eur. Ct. H.R., App. No. 55721/07 (July 7, 2011) 16, 17

Alejandre v. Cuba, Case No. 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/ V/II.106 Doc. 3 rev. (Sept. 29, 1999) 15, 16, 17

Andreou v. Turkey, Eur. Ct. H.R., App. No. 45653/99 (Jan. 27, 2010)..... 17

Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168 (Dec. 19, 2005)..... 15

Celiberti de Casariego v. Uruguay, Comm'cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979 (July 29, 1981) 13

Cyprus v. Turkey, Eur. Ct. H.R., App. No. 25781/94 (May 10, 2001)..... 16

Kindler v. Canada, Comm'cn No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/ 470/1991 (July 30, 1993)..... 13

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 2004 I.C.J. 136 (July 9, 2004)..... 15

Lopez Burgos v. Uruguay, Comm'cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981) 14, 15, 17

Munaf v. Romania, Comm'cn No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/ 1539/2006 (Aug. 21, 2009) 13

Öcalan v. Turkey, 41 Eur. Ct. H.R. 45 (May 12, 2005)..... 16

Pad v. Turkey, Eur. Ct. H.R., App. No. 60167/00 (June 28, 2007) 17

Pisari v. Moldova & Russia, Eur. Ct. H.R., App. No. 42139/12 (April 21, 2015) 16, 17

Other Authorities

American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948) 16

Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185 9

González, Daniel, & Rob O'Dell, *Use of Force by Border Agents Falls*, Arizona Republic, April 9, 2015, at A1 5

International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty No. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 ..... 11, 12, 13, 14

Article 2 14

Article 2(1) 13, 14

Article 2(3) 11

Article 6(1) 11, 12

Letter of Transmittal from the President to the Senate, Feb. 23, 1978, 1966 U.S.T. LEXIS 521 12

McGoldrick, Dominic, *The International Covenant on Civil and Political Rights*, in *Extra-territorial Application of Human Rights Treaties* (Fons Coomans & Menno T. Kamminga eds. 2004) 13

Restatement (Third) of the Foreign Relations Law of the United States (1987) 10

U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) 14

U.S. Constitution 1, 9, 12, 18
4th Amendment 1, 12
5th Amendment 1, 12

U.S. Justice Department Press Release, *Federal Officials Close the Investigation into the Death of Ramses Barron-Torres* (Aug. 9, 2013) 6

White House Press Release, *Remarks by President Obama and President Calderón of Mexico at Joint Press Conference* (March 3, 2011) 2, 4

INTEREST OF *AMICUS CURIAE*

The Government of the United Mexican States respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for all parties have received timely notice of Mexico's intent to file this brief and have consented in writing to its filing.[1]

On June 7, 2010, U.S. Border Patrol agent Jesus Mesa shot and killed Sergio Adrián Hernández Güereca, a fifteen-year-old national of Mexico. At the time of the shooting, the agent was in the United States, and the boy was in Mexico. Sergio's parents sued Agent Mesa in U.S. District Court for damages for the unjustified killing of their son.[2] The District Court and the Court of Appeals en banc held that their claim could not be heard because their son was on Mexican soil when he was killed.

The petition in this case raises important issues concerning the applicability of the Fourth and Fifth Amendments to the U.S. Constitution. In recognition of U.S. sovereignty, Mexico respects the authority of the United States courts to interpret their own Con-

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] As this case is before the Court on review of an order granting a motion to dismiss for failure to state a claim, we assume the facts alleged in the complaint to be true for present purposes.

stitution and laws. Mexico, however, hopes and believes that this Court will find it helpful to hear Mexico's perspective on matters affecting Mexico's sovereign interests.

As a sovereign and independent state, Mexico has a responsibility to maintain control over its territory and to look after the well-being of its nationals. When agents of the United States government violate fundamental rights of Mexican nationals and others within Mexico's jurisdiction, it is a priority to Mexico to see that the United States has provided adequate means to hold the agents accountable and to compensate the victims. The United States would expect no less if the situation were reversed and a Mexican government agent, standing in Mexico and shooting across the border, had killed a U.S. national standing on U.S. soil.

The 2,000-mile-long border between Mexico and the United States is the busiest in the world, with over 350 million crossings per year.[3] Each of the two nations is strongly engaged in and has a legitimate concern for the policies of the other in connection with their shared border. Mexico has a vital interest in working with the United States to improve the safety and security of the border and ensure that both governments' agents act to protect, rather than endanger, the safety of members of the public in the border area.

---

[3] *See, e.g.*, White House Press Release, *Remarks by President Obama and President Calderón of Mexico at Joint Press Conference* (March 3, 2011).

SUMMARY OF ARGUMENT

This case involves an important and recurring fact pattern warranting the attention of this Court. The border between the United States and Mexico runs through heavily populated areas, and residents of border communities, as they go about their daily business, routinely come in contact with—or within range of the weapons of—agents of the U.S. government. In recent years, officers of the U.S. border agencies have killed dozens of individuals, justifiably or otherwise, at or near the U.S.-Mexico border. Yet the Fifth Circuit ruling effectively means the families of those killed may not obtain any remedy, no matter how unjustified the agents' actions, if the victims happened to be on the Mexican side of the border when the agent opened fire.

Under this Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), there is no bright line at the border beyond which all constitutional rights cease. Rather, this Court has employed a case-by-case inquiry to determine if it would be impractical or anomalous to apply U.S. constitutional rights outside U.S. borders. Here, Agent Mesa was clearly on U.S. soil when he acted, and there are no practical or political difficulties in applying U.S. law regardless of which side of the border Sergio Hernández was on. Unlike *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), applying U.S. law in this case would not interfere with operations of the Mexican government within Mexico. On the contrary, providing an adequate and effective remedy would show appropriate respect for Mexico's sovereignty on its own territory and for the rights of its nationals.

The decision below also failed to take due account of the binding international human rights obligations that the United States has voluntarily undertaken to Mexico and its nationals. Those include, among other things, the fundamental right not to be arbitrarily deprived of life and the right to an adequate remedy when that right has been violated. A nation's obligations to respect human rights do not stop at its borders but apply anywhere that the nation exercises effective control. The Fifth Circuit's refusal to provide any remedy at all for an unjustified cross-border shooting of an unarmed Mexican national is plainly inconsistent with those obligations.

ARGUMENT

I.
THE INCIDENT IN THIS CASE IS NOT AN ISOLATED OCCURRENCE.

The border between the United States and Mexico is, as noted, one of the busiest in the world.[4] The border runs through populated areas, in some cases dividing in two a single town, city or Indian tribal area. In recent decades, the establishment of a secured and patrolled border has meant that residents of border communities come into frequent contact with officers guarding the border. In some areas, residents going about their daily business on the Mexican side of the border spend much of their day

---

[4] *See supra* note 3 and accompanying text.

within shooting distance of armed U.S. Border Patrol agents.

Shootings at the border—whether or not justified in any particular case—are, unfortunately, far from a rare occurrence. According to an April 2015 press report, U.S. Customs and Border Patrol officers and U.S. Border Patrol agents have killed fifty-one people since 2005, nearly all of them at or near the U.S.-Mexico border.[5] Five of these killings occurred in the period from October 2014 to April 2015 alone.

A number of these killings, in addition to the one at issue in this case, have involved shots fired across the border. For example, in 2012, 16 year-old José Rodríguez was shot and killed while walking down Calle Internacional, a street in Nogales, Mexico, which runs alongside the international border, by a U.S. Border Patrol officer in the United States. Calle Internacional is a busy thoroughfare lined with commercial buildings, where many residents of Nogales walk or drive when going about their daily business. In the *Rodriguez* case, the victim's mother brought a civil action in United States District Court for the District of Arizona against the Border Patrol agent who killed her son. But in that case, unlike here, the District Court denied the agent's motion to dismiss.[6]

---

[5] *See* Daniel González & Rob O'Dell, *Use of Force by Border Agents Falls*, Arizona Republic, April 9, 2015, at A1.

[6] *Rodriguez v. Swartz*, No. No. 4:14-cv-02251 (D. Ariz. July 9, 2015) (Pet. App. 153), *appeal docketed*, No. 15-16410 (9th Cir. July 15, 2015).

Also in 2012, Guillermo Arévalo Pedraza, a Mexican national, was shot by U.S. Border Patrol agents who were standing on an airboat on the United States' side of the Rio Grande near Laredo, Texas, while he was celebrating his wife's and daughter's birthday at a park on the Mexican bank of the river. His wife and daughter were standing only feet away. The Border Patrol agents fled the scene, rendering no assistance to the victim, who subsequently died. Arévalo's widow filed a civil action against the Border Patrol agents in the Southern District of Texas; that suit has been stayed pending the outcome of this certiorari petition.[7]

That same year, Mexican national Juan Pablo Pérez Santillán also was killed by U.S. Border Patrol agents while he was standing in Mexican soil near the Matamoros–Brownsville, Texas, border. His mother filed a civil action in the Southern District of Texas, which has been stayed pending the outcome of this certiorari petition.[8]

For yet another example, 17-year-old Ramses Barron Torres was shot and killed in Nogales, Mexico in 2011 by Border Patrol agents standing on U.S. soil. The U.S. Justice Department declined to bring criminal charges against the agents.[9] These exam-

---

[7] *Lam Gallegos v. United States*, No. 5:14-cv-00136 (S.D. Tex. Aug. 18, 2015) (order granting stay).

[8] *Cazares Santillan v. United States*, No. 1:14-cv-00114 (S.D. Tex. May 20, 2015) (order granting stay).

[9] U.S. Justice Department Press Release, *Federal Officials Close the Investigation into the Death of Ramses Barron-Torres* (Aug. 9, 2013).

ples illustrate that the incident in this case was not isolated or unique. Rather, killings of this type have occurred on multiple occasions in the past and are likely to continue to occur in the future.

II.
IT IS IMPORTANT THAT THE U.S. PROVIDE AN EFFECTIVE REMEDY IN CROSS-BORDER SHOOTING CASES

Mexico considers it important that the United States make available an effective remedy to individuals on Mexican territory seeking redress for unjustified violence by U.S. border officers. The lower courts' decisions in the case have effectively precluded any such redress, and review by this Court is important to ensure that victims of cross-border violence are not completely deprived of their day in court.

A. There Is No Practical Reason to Deny a Remedy Merely Because the Fatal Shot Struck Sergio Hernández on the Mexican Side of the Border

This Court has recognized in the past that U.S. constitutional protections can extend beyond the nation's sovereign territory. Most recently, in *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that questions of application of U.S. constitutional rights to persons outside the United States must be answered on the basis of "objective factors and practical concerns, not formalism." *Id.* at 764; *see also id.* at 726-28, 757-63. The *Boumediene* case involved prisoners detained at Guantánamo Bay Naval Air Station, Cuba, an area technically under

Cuban sovereignty but under the effective control of the United States. The Court accepted that Guantánamo Bay was not part of the territory of the United States. But rather than applying a technical approach based on *de jure* sovereignty, the Court looked to the practical effects of U.S. control at Guantánamo and held that the constitutional right of habeas corpus applied there.

In so holding, this Court distinguished the case from *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). In *Verdugo-Urquidez*, the Court declined to extend the Fourth Amendment's search warrant requirement to a search conducted in Mexico by Mexican police at the request of the U.S. Drug Enforcement Administration. The Court noted that applying U.S. constitutional requirements to actions of the Mexican police in cooperation with U.S authorities would raise serious practical difficulties for the ability of the United States to "'functio[n] effectively in the company of sovereign nations.'" *Id.* at 275 (quoting *Perez v. Brownell*, 356 U.S. 44, 57 (1958)). In his concurring opinion, Justice Kennedy emphasized that the inapplicability of the warrant requirement did not necessarily prevent the application of other U.S. constitutional rights, but he agreed with the majority that the circumstances of that case would make adherence to the Fourth Amendment's warrant requirement "impracticable and anomalous." *Id.* at 278 (Kennedy, J., concurring) (quoted in *Boumediene*, 553 U.S. at 759-60).

Here, by contrast, applying U.S. law would cause no clashes between U.S. and Mexican law. Agent Mesa, unlike the U.S. DEA agents in *Verdugo-Urquidez*, was not acting in cooperation with Mexi-

can law enforcement agencies, nor was he carrying out any operations on Mexican territory. He was operating on U.S. soil as part of his duties under U.S. law, and he was in the United States when he fired the fatal shot. Extending the requirements of the U.S. Constitution to cover the actions of a U.S. officer in the U.S. would not interfere in any way with Mexico's "control over its territory ... and authority to apply the law there." *Boumediene*, 553 U.S. at 754 (quotation and citation omitted).

According to the Complaint, just prior to the fatal shooting, Sergio Hernández and several other children were playing in the nearly dry, concrete-lined channel of the Rio Grande, which separates El Paso from Ciudad Juárez. Pet. App. 146. The international border invisibly runs down the center line of that concrete channel.[10] The children were repeatedly running up the side of the channel, touching the U.S. border fence (which is on U.S. territory), and then running back down into the channel. Sergio Hernández was apparently on the Mexican side of the border when Agent Mesa shot him. But there would be no practical difficulties involved if the U.S. courts were to apply the same law of excessive force to Agent Mesa's actions, regardless of which side of that invisible line Sergio happened to be on when Agent Mesa's fatal shot struck him.

There is no reason why requiring Agent Mesa to answer for his actions in U.S. court would require

---

[10] Convention for the Solution of the Problem of the Chamizal, U.S.-Mex., art. 3, Aug. 29, 1963, 15 U.S.T. 21, 505 U.N.T.S. 185.

any different considerations than any other excessive-force case heard by the U.S. courts. Applying U.S. constitutional law in such a case does not disrespect Mexico's sovereignty. Any invasion of Mexico's sovereignty occurred when Agent Mesa shot his gun across the border at Sergio Hernández—not when the boy's parents sought to hold Agent Mesa responsible for his actions.

When an illegal act is committed in one country and has a direct effect in another country, it is well recognized that both countries have jurisdiction. *See, e.g.*, *Restatement (Third) of the Foreign Relations Law of the United States* § 403 cmt. d (1987). Exercise of jurisdiction by either, therefore, is neither impracticable nor an affront to the sovereign interests of the other. Mexico has a fundamental interest in protecting the rights of its nationals and other persons in its territory, but the United States also has an interest in preventing its own territory from being used to launch assaults on nationals of friendly foreign nations—particularly if those attacks are carried out by a federal officer of the United States in the course of his duties.[11]

The Mexican government has sought the extradition of Agent Mesa to Mexico, but the U.S. govern-

---

[11] For that reason, Judge Dennis was mistaken when he suggested, in his concurring opinion below, that it would raise "practical and political questions" to apply the U.S. law of excessive force to Agent Mesa's actions in this case. *Hernandez v. United States*, 785 F.3d 117, 133 (5th Cir. 2015) (en banc) (Dennis, J., concurring in part and concurring in the judgment) (Pet. App. 32).

ment denied that request. As a practical matter, if Agent Mesa avoids travel to Mexico, any effective and enforceable remedy against him can only come from the U.S. courts.

B. The U.S. Has Undertaken an Obligation to Provide a Remedy for Human Rights Violations to Individuals on Both Sides of the Border

Mexico and the United States have recognized that respect for basic human rights, including the right not to be arbitrarily deprived of life, is part of the international obligations of every nation. Among other things, both Mexico and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR),[12] which provides in Article 6(1) that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." The ICCPR further provides, in Article 2(3), that individuals whose rights are violated "shall have an effective remedy," including judicial remedies, and that those remedies must be enforced when granted.

Although the United States' obligations under the ICCPR have not been treated as directly enforceable in United States courts, *see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court has recognized that decisions interpreting the ICCPR and other international human rights treaties may be

---

[12] International Covenant on Civil and Political Rights, Dec. 19, 1966, U.S. Senate Treaty No. 95-20, 1966 U.S.T. LEXIS 521, 999 U.N.T.S. 171 (ratified by Mexico Mar. 23, 1981; ratified by U.S. June 8, 1992).

persuasive to the extent they shed light on basic human rights principles that are common to those treaties and the U.S. Constitution. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 575-76 (2005); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). The international commitments that the United States undertook in Article 6(1) of the ICCPR have obvious parallels in the Fourth Amendment and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. In fact, the principal reason the United States declared the ICCPR non-self-executing in U.S. courts was that it regarded existing U.S. constitutional law as being more than sufficient to comply with the ICCPR.[13]

It is well established under the ICCPR and other international human rights treaties that a nation has human rights obligations whenever it exercises "effective control" over an individual, even if such control is exercised outside of its own territory. The claim in this case lies within the scope of the United States' international human rights commitments be-

---

[13] The Executive Branch advised the Senate that "the substantive provisions of [the ICCPR] are entirely consistent with the letter and spirit of the United States Constitution and laws," except in a few instances in which the U.S. took an explicit reservation against specific ICCPR provisions. Letter of Transmittal from the President to the Senate, Feb. 23, 1978, 1966 U.S.T. LEXIS 521, at *2. Interpreting the U.S. Constitution and laws as inapplicable in a situation covered by the ICCPR would leave an unexpected gap in the intended U.S. legal framework for compliance with the ICCPR.

cause the U.S. federal government, through the actions of Agent Mesa, exercised power and effective control over Sergio Hernández.

In particular, Article 2(1) of the ICCPR requires each party "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR]." This provision has been read disjunctively to apply to "all individuals within [the State's] territory" and "all individuals ... subject to [the State's] jurisdiction."[14] In keeping with the intent of the ICCPR to protect individual human rights, "jurisdiction" has been given a flexible reading, turning on the State's effective exercise of control rather than on legal technicalities. The United Nations Human Rights Committee—the body

---

[14] *Celiberti de Casariego v. Uruguay*, Comm'cn No. 56/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/56/1979, ¶¶ 10.1-10.3 (July 29, 1981) (Covenant applies to cases of kidnapping by State agents abroad); *Munaf v. Romania*, Comm'cn No. 1539/2006, U.N. H.R. Comm., U.N. Doc. CCPR/C/96/D/1539/2006, ¶ 14.2 (Aug. 21, 2009) (State may be liable for violations of the Covenant outside of its area of control, as long as State's activity was "a link in the causal chain that would make possible violations in another jurisdiction"); *Kindler v. Canada*, Comm'cn No. 470/1991, U.N. H.R. Comm., U.N. Doc. CCPR/C/48/D/470/1991, ¶ 14.6 (July 30, 1993) (State party may be liable under the Covenant for extraditing a person within its jurisdiction or under its control if there is a real risk that the extradited person's rights under the Covenant will be violated in the receiving jurisdiction); Dominic McGoldrick, *The International Covenant on Civil and Political Rights*, § 4.3, in *Extraterritorial Application of Human Rights Treaties* (Fons Coomans & Menno T. Kamminga eds. 2004).

charged with interpreting the ICCPR—has observed that:

> States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.

U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004).

This principle has been applied in a variety of situations in which States have violated the rights of individuals without fully controlling the territory on which those violations occur. For example, the U.N. Human Rights Committee has opined that the alleged secret detention and torture of a trade-union activist in Argentina by Uruguayan security officials would violate the ICCPR. *Lopez Burgos v. Uruguay*, Comm'cn No. 52/1979, U.N. H.R. Comm., U.N. Doc. CCPR/C/13/D/52/1979 (July 29, 1981). The Committee observed that "it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another

State, which violations it could not perpetrate on its own territory." *Id.* ¶ 12.3.[15]

Under other human rights instruments, a similar principle has been found to apply even in situations where the State has used lethal force without ever obtaining physical custody of the victim. It is the use of force itself that constitutes sufficient exercise of control for purposes of the jurisdiction under the relevant human rights instruments. For example, the Inter-American Commission on Human Rights has applied an effective-authority test in several cases, including the *Alejandre v. Cuba*, Case No. 11,589, Inter-Am. Comm'n H.R., Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. (Sept. 29, 1999).[16] The *Alejandre* case arose out of the well-known 1996 "Brothers to the Rescue" incident, in which the Cuban Air Force shot down two unarmed civilian air-

---

[15] Similarly, the International Court of Justice has repeatedly recognized that the ICCPR applies in occupied territory under a State's control, even though that territory is not technically part of the State's sovereign territory. *See, e.g., Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, ¶ 216 (Dec. 19, 2005); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 2004 I.C.J. 136, ¶¶ 109-111 (July 9, 2004).

[16] *See also, e.g., Aisalla Molina Case (Ecuador v. Colombia)*, Inter-State Petition IP-02, Inter-Am. Comm'n. H.R., Report No. 112/10, OEA/Ser.L/V/II.140 Doc. 10, ¶¶ 87-103 (Oct. 21, 2010) (American Convention on Human Rights applied in Ecuador where Colombian armed forces conducted a bombing raid and thereafter "exercised acts of authority over the survivors" in the bombed area).

planes in international airspace between South Florida and Cuba. The Commission found that the facts constituted "conclusive evidence that agents of the Cuban State, although outside their territory, placed the civilian pilots of the 'Brothers to the Rescue' organization under their authority." *Id.* ¶ 25. The Commission went on to hold that the Cuban Air Force's unjustified use of lethal force violated fundamental principles of human rights, including the right to life as recognized in Article I of the American Declaration of the Rights and Duties of Man.[17] *Id.* ¶ 53.

Likewise, the European Court of Human Rights has adopted a similar functional approach in cases arising under the European Human Rights Convention.[18] It has applied the Convention in several cases

---

[17] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (May 2, 1948).

[18] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. *See, e.g.*, *Pisari v. Moldova & Russia*, Eur. Ct. H.R., App. No. 42139/12, ¶ 33 (April 21, 2015) (convention applied to Russia where Russian solider shot and killed a Moldovan citizen even though Russian soldier was not in Russian territory when he fired his weapon); *Öcalan v. Turkey*, 41 Eur. Ct. H.R. 45, ¶ 91 (May 12, 2005) (convention applied in view of "effective Turkish authority" over individual in custody of Turkish officials in Nairobi, Kenya); *Cyprus v. Turkey*, Eur. Ct. H.R., App. No. 25781/94, ¶¶ 69-80 (May 10, 2001) (convention applied where Turkey exercised "effective control" in the Turkish Republic of Northern Cyprus); *Al-Saadoon v. United Kingdom*, Eur. Ct. H.R., App. No. 61498/08, ¶¶ 86-89 (June 30, 2009) (convention applied in U.K. military prison in Iraq); *Al-Skeini v. United Kingdom*, Eur. Ct. H.R., App.

where, as here, a State's actions within its territory resulted in injuries to victims outside its territory. For example, in *Andreou v. Turkey*, Eur. Ct. H.R., App. No. 45653/99 (Jan. 27, 2010), the European Court of Human Rights held that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as 'within the jurisdiction' of Turkey" so as to engage Turkey's human rights obligations. *Id.* ¶ 25.[19]

This case is, in many respects, an even easier case than the cases cited. Unlike *Alejandre* and the cases involving occupied territory, the killing at issue in this case does not involve military action. Unlike *Lopez Burgos*, it does not involve overseas activities by intelligence or national security agencies. And unlike each of those cases, it does not even involve action outside a country's sovereign territo-

---

No. 55721/07, ¶¶ 130-150 (July 7, 2011) (convention applied in Iraq where the Coalition Provisional Authority exercised control).

[19] *See also, e.g., Pad v. Turkey*, Eur. Ct. H.R., App. No. 60167/00, ¶¶ 52-55 (June 28, 2007) (convention applied where Turkish helicopter shot and killed seven Iranian men near the Turkey-Iran border, even if it was unclear whether the Iranian men had crossed the border into Turkey); *Pisari*, *supra* note 18, ¶ 33 (noting the accepted rule that "in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities" such that the convention and its obligations apply).

ry—Agent Mesa was standing on U.S. soil when he shot and killed Sergio Hernández. He was patrolling the United States side of the border in the course of his law-enforcement duties for the U.S. government and exercised effective control and authority over Sergio Hernández through his use of deadly force against Sergio Hernández, who happened to be across the invisible line separating the two countries.

This Court has already reached a similar result in *Boumediene*, in which it rejected a rigid territorial approach to the application of rights guaranteed by the U.S. Constitution to individuals outside the United States. Here, as in *Boumediene*, practicality and common sense—as well as the United States' international human rights obligations—demonstrate that the U.S. Border Patrol's obligation to refrain from unjustified use of deadly force does not vanish when the victim is located just across the border in the territory of a foreign nation.

CONCLUSION

For the reasons stated above, *amicus curiae* the Government of the United Mexican States respectfully urges the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

Donald Francis Donovan
Counsel of Record
Carl J. Micarelli
Brandon P. Burkart
Christel Y. Tham
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000
dfdonovan@debevoise.com

Attorneys for Amicus Curiae the Government of the United Mexican States

August 26, 2015